

THE SOFTWARE PIRACY BATTLE IN LATIN AMERICA: SHOULD THE UNITED STATES PURSUE ITS AGGRESSIVE BILATERAL TRADE POLICY DESPITE THE MULTILATERAL TRIPS ENFORCEMENT FRAMEWORK?

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1. INTRODUCTION

Software piracy may be defined as the illegal copying or unauthorized use of a software product.¹ In Latin America,² packaged software³ accounted for \$3.54 billion in sales and \$1.24 billion in tax revenues in 1998.⁴ Latin America is the third fastest growing market for packaged software.⁵ In 1996, however, Latin American software piracy resulted in a loss of \$980,600,000 to international software manufacturers.⁶ In 1997, the loss was

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¹ See BERNARD A. GALLER, SOFTWARE AND INTELLECTUAL PROPERTY PROTECTION: COPYRIGHT AND PATENT ISSUES FOR COMPUTER AND LEGAL PROFESSIONALS 67 (1995).

² "Latin America" refers to the following nineteen countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Panama, Paraguay, Peru, Puerto Rico, Trinidad and Tobago, Uruguay, and Venezuela. See PRICEWATERHOUSECOOPERS, CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE LATIN AMERICAN ECONOMIES 46 (1999) (study commissioned by the Business Software Alliance).

³ Packaged software, such as "Microsoft Office," is distributed through a variety of channels rather than being custom programmed for an individual purchaser. See *id.* at 6, 18.

⁴ See *id.* at 1.

⁵ See Scott Studebaker, *Microsoft's Challenges in Latin America*, LATIN AM. L. & BUS. REP., July 31, 1995, at 3 (interviewing Jeffrey Steinhardt, Microsoft's corporate attorney for Latin America).

⁶ INT'L PLANNING AND RESEARCH CORP. FOR THE BUS. SOFTWARE ALLIANCE AND SOFTWARE & INFO. INDUS. ASS'N, 1998 GLOBAL SOFTWARE PIRACY REPORT 7 (1999) [hereinafter 1998 GLOBAL SOFTWARE PIRACY REPORT]. These piracy figures calculate lost sales rather than pirated copies as

\$978,000,000.⁷ In 1998, the loss increased to \$1,045,500,000.⁸ The U.S. software industry has vigorously combated Latin American software piracy by way of internal litigation, lobbying of legislatures, education, and cooperation with domestic law enforcement agencies.⁹

The U.S. government, in part because of complaints from the software industry, has applied unilateral pressure on Latin American countries to increase their copyright protection through legislation. Section 301 of the Omnibus Trade and Competitive Act of 1988 requires the United States Trade Representative ("USTR") to review annually the intellectual property practices of U.S. trading partners and sanction countries engaged in trade practices deemed unfair to U.S. interests.¹⁰ Section 301 trade threats against certain Latin American nations have resulted in changes in their domestic intellectual property laws.¹¹ The software industry's pressure to pursue section 301 actions against infringing countries is unlikely to vanish, given the success of the USTR's actions in strengthening software copyright protection.¹²

In 1994, the United States and the Latin American nations signed the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), an annex to the General Agreement on Tariffs and Trade ("GATT") that established the World Trade Organization ("WTO").¹³ The GATT resulted from post-World War II efforts to develop a system of free trade among nations,

a proportion of total sales. See *id.* at 11-12. Often these piracy figures are overestimates, because many buyers of pirated software would never have purchased software at full price. See *The Property of the Mind*, *ECONOMIST*, July 27, 1996, at 57.

⁷ See 1998 GLOBAL SOFTWARE PIRACY REPORT, *supra* note 6, at 7.

⁸ See *id.* (citing the most recent figures available).

⁹ See generally Studebaker, *supra* note 5, at 3, 31-32 (recounting various efforts undertaken to combat software piracy).

¹⁰ See 19 U.S.C. §§ 2411-2420 (1999).

¹¹ For example, Argentina has finally extended copyright protection to computer software. See *infra* Section 2.3 (discussing recent changes in Latin American domestic copyright laws) and *infra* Section 2.3.1 (discussing 1998 Argentine changes in copyright law).

¹² See SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 223 (1998).

¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS— RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

and resulted in a successful forum in which to negotiate trade agreements and disputes.¹⁴ Having operated under secretariats since 1948, the GATT was replaced in 1995 with the WTO, which is "essentially a continuation of the GATT under a new name."¹⁵ Therefore, under TRIPs, the WTO may assemble international panels to consider intellectual property trade disputes.¹⁶

Article 10.1 of the TRIPs Agreement provides that members must comply with the Berne Convention¹⁷ by providing protection under copyright law to computer software.¹⁸ The TRIPs Agreement incorporates the Berne Convention, which has served as this century's predominant international intellectual property treaty.

One of the principal motives for including intellectual property rights as part of the Uruguay Round of the GATT was the perception that the existing international intellectual property regime lacked effective enforcement.¹⁹ Accordingly, Part III of the TRIPs Agreement establishes a comprehensive enforcement regime.²⁰

Although the United States has successfully forced certain Latin American nations to change their copyright laws, some commentators argue that these changes exist on paper only.²¹ True protection of software intellectual property will not exist until Latin American nations enforce their newly revised copyright laws.

Section 2 of this comment provides an overview of the intellectual property legal structure relevant to software copyright issues in Latin America, including: a discussion of domestic laws,

¹⁴ See WILLIAM F. PATRY, COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AGREEMENTS ACT 1 (1995).

¹⁵ *Id.*

¹⁶ See *id.* at 2.

¹⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 102 Stat. 2853, 828 U.N.T.S. 4 [hereinafter Berne Convention].

¹⁸ See TRIPs Agreement, *supra* note 13, arts. 9.1, 10.1.

¹⁹ See MICHAEL BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPs AGREEMENT 123 (1996).

²⁰ See TRIPs Agreement, *supra* note 13.

²¹ See SELL, *supra* note 12, at 177.

international treaties, multilateral agreements, and U.S. trade laws that authorize the USTR to push for bilateral agreements.

Section 3 discusses underlying reasons for the software piracy problem in Latin America.

Section 4 argues that the United States should no longer combat software copyright piracy using unilateral trade threats to force bilateral agreements; instead, the United States should use the WTO enforcement mechanisms created by TRIPs.

2. OVERVIEW OF THE INTELLECTUAL PROPERTY LEGAL STRUCTURE

2.1. *Copyright Law Background*

Copyright law has historically protected literary expression such as books and poetry.²² In the United States, copyright law grants software copyright owners exclusive rights to their works for varying periods, but typically with a ninety-five-year maximum period.²³ Copyright is an automatic protection that is conferred as soon as an original expression, e.g., the computer code, is fixed in a tangible medium.²⁴ Publication or registration is not required.²⁵ Copyright protection is "thin" because it permits duplication of function, or underlying ideas, as long as the expression differs.²⁶ For example, a programmer may develop an idea such as a word processor, as long as he or she does not directly copy the computer language or visual expression of another creator's word processor.

In contrast, U.S. patent law offers twenty years of protection to owners of inventions, i.e., works that are non-obvious, novel, and useful.²⁷ Unlike copyright law, a patent protects its owner against *all* users and sellers of the patented invention, even an independent discoverer.²⁸

²² See GALLER, *supra* note 1, at 30.

²³ See 17 U.S.C. § 302 (1999).

²⁴ See STEERING COMM. FOR INTELLECTUAL PROPERTY ISSUES IN SOFTWARE, NAT'L RESEARCH COUNCIL, INTELLECTUAL PROPERTY ISSUES IN SOFTWARE 24 (1991) [hereinafter STEERING COMM.].

²⁵ See *id.*

²⁶ See *id.*

²⁷ See 35 U.S.C. § 154 (1999); GALLER, *supra* note 1, at 30.

²⁸ See *id.* at 31.

Industrial designs such as software are generally covered by both copyright and patent law in all industrialized countries.²⁹ In the United States, copyright is the preferred intellectual property protection for software.³⁰ The pro-copyright argument holds that patents are anti-competitive because they hinder independent invention and progress of technology through the monopoly granted to the patent owner.³¹ With strong U.S. encouragement, copyright protection has become the international standard for software. The general consensus of the developed-world is that computer programs can be protected under classic copyright terms as works of authorship because the activity involved in writing a computer program is comparable to the activity of writing a book or symphony.³²

2.2. *The U.S. Bilateral Approach: Intellectual Property in U.S. Trade Legislation*

The U.S. government worked throughout the 1980s and 1990s to improve the level of intellectual property protection granted by Latin American nations. This Section explains the influence the United States has exerted by way of unilateral trade threats and bilateral negotiations with Latin American governments.

2.2.1. *Origin of Section 301 and Special 301*

Section 301 and Special 301 of the United States Trade Act of 1974 have been effective tools in the U.S. battle against intellectual property piracy. In 1984, pressure from trade lobbyists and an impasse at the GATT over whether to confront intellectual property issues resulted in an amendment to section 301 of the Trade Act of 1974.³³ The original section 301 allowed the President to pursue elimination of "unjustifiable or unreasonable" trade practices.³⁴ The 1984 Trade and Tariff Act "made intellec-

²⁹ See STEERING COMM., *supra* note 24, at 21.

³⁰ See *id.* at 22.

³¹ See *id.* at 31.

³² See ROBERT M. SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 43 (1990).

³³ See BLAKENEY, *supra* note 19, at 4.

³⁴ *Id.*

tual property protection explicitly actionable under section 301.”³⁵

The success of section 301 led to the enactment of Special 301 of the Omnibus Trade and Competitiveness Act of 1988.³⁶ Special 301 requires the USTR to review annually the intellectual property practices of U.S. trading partners.³⁷ The USTR must identify “priority foreign countries” that deny “adequate and effective protection of intellectual property rights” or that deny “fair and equitable market access” to U.S. traders.³⁸ The USTR must then assign “priority foreign countries” to a watch list or a priority watch list, investigate the countries on a six-month fast track, and then engage in trade retaliation of increased duties or import restrictions.³⁹

2.2.2. *Representative USTR Actions in Latin America Concerning Computer Software Copyright Protection*

The USTR has encouraged various Latin American nations to pass stronger intellectual property laws than TRIPs requires. For example, on December 16, 1997, the United States concluded a Bilateral Intellectual Property Rights Agreement with Nicaragua that required Nicaragua to provide protection to copyrights, patents, trademarks, trade secrets, semiconductor layout designs, encrypted satellite signals, and geographical indications.⁴⁰ The agreement contained enforcement provisions to combat infringement of intellectual property rights with both civil remedies and criminal penalties.⁴¹ Furthermore, the agreement required Nicaragua to implement the protections within eighteen months, approximately six months prior to the TRIPs deadline.⁴² U.S. Trade Representative Charlene Barshefsky hoped that “[t]his Agreement [would] provide a model for other Central American

³⁵ *Id.* at 4 (citing 98 Stat. 2948 (1984)).

³⁶ *See id.* at 4-5 (citing 19 U.S.C. § 2242 (1990)).

³⁷ *See id.* at 5.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See* USTR, *U.S. and Nicaragua Reach Bilateral Intellectual Property Rights Agreement* (last modified Dec. 22, 1997) <<http://www.ustr.gov/releases/1997/12/97-109.pdf>> (USTR Press Release).

⁴¹ *See id.*

⁴² *See id.*

countries, and stimulate increased protection and enforcement of intellectual property rights in the region.”⁴³

On April 17, 1998, the United States and Bolivia signed a Bilateral Investment Treaty intended to strengthen trade relations between the two nations.⁴⁴ Bolivia, a relatively impoverished nation, stood to greatly benefit from increased U.S. investment. Ms. Barshefsky explained that the treaty was made possible by Bolivia’s economic reform, including a commitment to accelerate its compliance with TRIPs.⁴⁵

Such section 301 actions are not expected to cease despite the enactment of the multilateral TRIPs amendment to the GATT.⁴⁶ In its legislation adopting TRIPs, the U.S. House of Representatives stated that “nothing in this Act shall be construed . . . to limit any authority conferred under a law of the United States, including section 301 of the Trade Act of 1974, unless specifically provided for in this Act.”⁴⁷ As evidenced in Nicaragua and Bolivia, the USTR is still actively engaged in unilateral trade threats against Latin American countries despite the existence of multilateral WTO dispute mechanisms.

2.3. *Domestic Copyright Laws in Latin America*

This Section explores the status of copyright protection in two of Latin America’s largest economies: Argentina and Brazil. These countries’ experiences are representative of the majority of Latin American countries, many of whom recently enacted laws that grant intellectual property protection to computer software, but did so only after the U.S. government pressured them with trade sanction threats.⁴⁸

⁴³ *Id.*

⁴⁴ See USTR, *United States and Bolivia Sign Bilateral Investment Treaty* (last modified Apr. 17, 1998) <<http://www.ustr.gov/releases/1998/04/98-41.pdf>> (USTR Press Release).

⁴⁵ See *id.*

⁴⁶ See SELL, *supra* note 12, at 222.

⁴⁷ Sylvia Morrison, *How Will the Uruguay Round of GATT Affect the U.S. Computer Industry?*, Congressional Research Report for Congress, Report No. 94-840-E, Nov. 3, 1994, at 3 (citing H.R. 5110).

⁴⁸ See, e.g., *False Friends (Piracy in Mexico)*, ECONOMIST, Jan. 13, 1996, at 66 (describing how the United States successfully pressured Mexico to strengthen and enforce intellectual property laws).

2.3.1. *Argentina*

Argentina's long-standing copyright law, Number 11.723, grants copyright to "literary and artistic works."⁴⁹ The law includes a list of products afforded copyright protection, such as books and records.⁵⁰

The law, of course, does not include computer software, a technology that was virtually unknown when the law was passed. During the 1980s and 1990s, U.S. software companies, such as Microsoft and Unisys, exerted pressure upon the Argentine government to amend the law to protect computer software, a \$1.8 billion annual business in Argentina.⁵¹ In addition, in 1993 the USTR placed Argentina on the Special 301 Priority Watch List, meaning that if Argentina did not modify its intellectual property laws regarding pharmaceutical patents, the United States would retaliate with unilateral trade sanctions.⁵²

In accordance with the Berne Convention, a 1994 presidential decree extended Law Number 11.723 to include copyright protection for computer software.⁵³ This decree, however, lacked teeth. On February 3, 1998, in direct contradiction of the presidential decree, the Argentine Supreme Court held that copying computer software without manufacturer authorization was not a crime.⁵⁴ The Court's decision protected the Argentine defendant company Benito Roggio's copying of an engineering design program made by U.S. plaintiff Autodesk, Inc. on grounds that Law Number 11.723 did not extend copyright protection to computer software.⁵⁵

⁴⁹ Beth Rubenstein, *Argentina Amends Law to Define Software as Eligible for Piracy Protection*, 15 INT'L TRADE REP. (BNA) No. 44, at 1891 (Nov. 11, 1998) [hereinafter Rubenstein, *Argentina Amends Law*].

⁵⁰ See *Software Protection Measure Stalls Once Again in Argentine Congress*, 15 INT'L TRADE REP. (BNA) No. 16, at 703 (Apr. 22, 1998) [hereinafter *Software Protection Measure Stalls*].

⁵¹ See Rubenstein, *Argentina Amends Law*, *supra* note 49.

⁵² See USTR, REPORT TO CONGRESS ON SECTION 301 DEVELOPMENTS REQUIRED BY SECTION 309(A)(3) OF THE TRADE ACT OF 1974, at 27 (June 1996-Jan. 1998) [hereinafter 1998 USTR REPORT TO CONGRESS].

⁵³ See Argentina: Economic Trends, July 1998: An Overview, INT'L MARKET INSIGHT REP., July 20, 1998, available in 1998 WL 13711938.

⁵⁴ See Beth Rubenstein, *Argentina Tightens Piracy Laws for Software Industry*, J. COM., Nov. 24, 1998 [hereinafter Rubenstein, *Argentina Tightens Piracy Laws*]; Rubenstein, *Argentina Amends Law*, *supra* note 49.

⁵⁵ See *En repuesta a un fallo de la Corte Suprema las empresas informáticas amenazan con limitar inversiones en el país*, EL CRONISTA (Feb. 4, 1998).

The U.S. software industry was shocked. An Argentine representative stated that the decision was "a step backwards compared to the rest of the world."⁵⁶ In response, the U.S. government and the software industry pushed for the passage of a pending amendment to Law Number 11.723 that would explicitly protect software.⁵⁷

In October 1998, the Argentine Congress and President Carlos Menem passed the urged amendment to Law 11.723, adding software and databases to the list of products protected by copyright.⁵⁸ The amendment went into effect in November 1998, upon publication in the country's official bulletin.⁵⁹ The amended law states that new programs created by employees during the course of business could belong to the company, rather than the individual programmer, if agreed to as a term of employment.⁶⁰ In addition, the law specifies that a software program purchaser may make only one copy for security purposes, to be used only if the original software fails.⁶¹ Jail sentences range from six months to six years, and the software's creator can sue for losses and court costs.⁶²

The amendment passed the Lower House of the Argentine Congress in September 1997.⁶³ However, the measure stalled in the Senate over the clause granting companies, rather than the individual creator, ownership of the software copyright.⁶⁴ Jorge Cassino, president of the Chamber of Software Companies and Computer Services, explained that the Senate members viewed the clause "as a way for companies to 'get rich illegally,'" rather than as a legitimate protection of their investment.⁶⁵ Cassino added, "[The Senators] see this as some kind of manipulation by

<<http://www.cronista.com>> [hereinafter EL CRONISTA]; Rubenstein, *Argentina Tightens Piracy Laws*, *supra* note 54.

⁵⁶ EL CRONISTA, *supra* note 55.

⁵⁷ See *id.*; see also *Software Protection Measure Stalls*, *supra* note 50.

⁵⁸ See *Software Protection Measure Stalls*, *supra* note 50.

⁵⁹ See Rubenstein, *Argentina Tightens Piracy Laws*, *supra* note 54.

⁶⁰ See *Software Protection Measure Stalls*, *supra* note 50.

⁶¹ See Rubenstein, *Argentina Amends Law*, *supra* note 49.

⁶² See *Argentine Software Manufacturers Launch Campaign for Anti-Piracy Law Compliance*, 15 INT'L TRADE REP. (BNA) No. 47, at 2006 (Dec. 2, 1998).

⁶³ See *Software Protection Measure Stalls*, *supra* note 50.

⁶⁴ See *id.*

⁶⁵ *Id.*

Microsoft.”⁶⁶ Senator Jorge Yoma declared, “This law isn’t against piracy. It’s for taking away copyright protection from workers.”⁶⁷ The bill ultimately passed Congress, but the Senate had clearly voiced its resentment over the perceived benefits of the bill to the U.S. software industry.

A Microsoft spokesman declared, “It is about time the government backs us up legally. We’ve been fighting piracy for too long without any support.”⁶⁸ A Business Software Alliance attorney said that the law “removes any question we have, and gives the full protection we need. . . . With more enforcement, we expect that the piracy rate in Argentina could drop a lot further.”⁶⁹ With this law in place, the U.S. software industry has achieved its lobbying goal.

The USTR described the 1998 law as a “positive step.”⁷⁰ However, the USTR argues that the Argentine government is still insufficiently protecting intellectual property rights.⁷¹ In October 1999, Deputy U.S. Trade Representative Richard Fisher met with representatives of Argentine presidential candidate Fernando de la Rúa and urged compliance with TRIPS, under threat of a WTO action.⁷² De la Rúa was elected Argentine president on October 24, 1999, replacing President Menem after a ten-year term, but the Argentine Congress and Courts remain under control of Menem’s political party.⁷³ As the January 1, 2000 deadline for TRIPS compliance approached, the USTR announced the initiation of WTO dispute settlement proceedings against Argentina for inadequate pharmaceutical patent protection.⁷⁴ It remains to be

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Rubenstein, *Argentina Tightens Piracy Laws*, *supra* note 54.

⁶⁹ Robert MacMillan, *Argentine Government Targets Piracy*, NEWSBYTES, Nov. 2, 1998.

⁷⁰ See USTR, *USTR Announces Results of Special 301 Annual Review* (last modified Apr. 30, 1999) <<http://www.ustr.gov/releases/1999/04/99-1.html>> (USTR Press Release).

⁷¹ See *id.*

⁷² See Corbett B. Daly, *U.S. Threatens Argentina with Complaint under TRIPs Agreement*, 16 INT’L TRADE REP. (BNA) No. 41, at 1712 (Oct. 20, 1999).

⁷³ See Clifford Krauss, *Argentina’s Switch: Electing a Less Flamboyant Leader*, N.Y. TIMES, Oct. 26, 1999, at A6.

⁷⁴ See USTR *Announces Results of Special 301 Annual Review*, *supra* note 70, at 4.

seen how the new Argentine presidential administration will react to ongoing U.S. trade pressure.

2.3.2. *Brazil*

Brazil derived its intellectual property system from late nineteenth century Europe,⁷⁵ which offered traditional protection to literary works. Under the antiquated system, Brazilian intellectual property law did not protect computer software.

Beginning in 1987, the United States pressured Brazil to enact legislation that would grant copyright protection to computer software.⁷⁶ Since both nations were members of the Universal Copyright Convention⁷⁷ and the Berne Convention, copyright protection could be extended to software without legal difficulty.⁷⁸

In response to U.S. pressure, a Brazilian law went into effect on December 18, 1987 that granted copyright protection to computer software.⁷⁹ However, the U.S. government was dissatisfied because the 1987 Software Law included a "law of similars" for foreign-manufactured software marketed in Brazil.⁸⁰ A "law of similars" mandates that foreign-manufactured software may not be allowed into the Brazilian market if there is a functional software equivalent manufactured by a Brazilian controlled company.⁸¹ In addition, the law extended only twenty-five years of protection to software, rather than the normal fifty years Brazil granted to other copyrighted works.⁸²

⁷⁵ See SHERWOOD, *supra* note 32, at 106.

⁷⁶ See Theodore G. Bryant, Comment, *The History, Development and Changing Environment of Protecting Computer Software Against Copyright Violation in Brazil*, 8 TRANSNAT'L LAW. 375, 389 (1995).

⁷⁷ See *id.* (citing Universal Copyright Convention of June 19, 1970, 1 B.D.I.E.L. 811).

⁷⁸ See Bryant, *supra* note 76, at 389; see also *infra* Section 2.4 (discussing the UCC and the Berne Convention).

⁷⁹ See Software Protection Law, No. 7.646 of Dec. 18, 1987; see also Bryant, *supra* note 76, at 389 (citing *Brazilian Senate Sets 'Top Urgency' Debate on Software Law in Response to U.S. Action*, 4 INT'L TRADE REP. (BNA) 1287 (Oct. 21, 1987)).

⁸⁰ See Bryant, *supra* note 76, at 389 (citing George Charles Fischer, *The Software Law*, LATIN AM. L. & BUS. REP., Sept. 1994, at 8).

⁸¹ See *id.* at 389 n.100.

⁸² See *id.* at 390.

In November 1987, the Reagan Administration responded with trade sanctions, raising tariffs on selected Brazilian exports to the United States and prohibiting importation of Brazilian computer products.⁸³ The controversy over allowing U.S. goods full market access into Brazil subsided once the Brazilian National Council for Informatics reversed a previous trade decision excluding Microsoft MS-DOS 3.2 from the Brazilian market, thus allowing the improved DOS software into the country.⁸⁴ The United States lifted the trade sanctions in February 1988, but continued to investigate Brazil's trade practices until the "Super 301" case ended in October 1989.⁸⁵

However, the "law of similars" and the twenty-five year term of protection remained unchanged. Throughout the 1990s, the United States continued to pressure Brazil to improve its copyright laws. On May 28, 1993, the USTR self-initiated an investigation into whether Brazil was denying adequate and effective protection of intellectual property rights, and whether the United States should implement trade retaliations against Brazil under section 301.⁸⁶ On February 28, 1994, the USTR terminated the investigation because of Brazilian assurances that it would improve its intellectual property laws.⁸⁷ In April 1995, due to Brazil's lack of legislative progress, the USTR placed Brazil on its Priority Watch List, which constituted a threat of imminent trade sanctions if Brazil did not comply with U.S. demands.⁸⁸ In April 1996, after Brazil passed improved patent protection for pharmaceuticals, the USTR moved Brazil from the Priority Watch List to the Watch List, lessening the threat of trade sanctions.⁸⁹ That same year, the USTR affirmed that "the U.S. Administration looks to Brazil to fulfill its longstanding commitments to enact

⁸³ See USTR, *Section 301 Table of Cases* (last modified Aug. 9, 1999) <<http://www.ustr.gov/reports/301report/act301.htm>> [hereinafter *Section 301 Table*] (discussing the disposition of "Brazil Informatics (301_49)"); see also Bryant, *supra* note 76, at 390 (citing *Trade Sanctions Imposed Against Brazil*, Statement (Nov. 13, 1987) in DEPT. ST. BULL., Jan. 1988, at 60) (noting that the trade sanctions were also related to U.S. dissatisfaction with Brazilian sanctions in the computer products markets).

⁸⁴ See Bryant, *supra* note 76, at 391.

⁸⁵ See *Section 301 Table*, *supra* note 83 ("Brazil Informatics (301_49)").

⁸⁶ See *id.* ("Brazil Intellectual Property Rights (301_91)").

⁸⁷ See *id.*

⁸⁸ See 1998 USTR REPORT TO CONGRESS, *supra* note 52, at 21.

⁸⁹ See *id.*

outstanding legislation on computer software . . . and to introduce much-needed amendments to its copyright law.”⁹⁰ In the 1997 section 301 review, the USTR kept Brazil on the Watch List, pending Brazilian legislation on computer software copyright.⁹¹

On February 19, 1998, Brazilian President Fernando Enrique Cardoso signed into law a bill that grants computer software the same fifty-year term of copyright protection as literary works.⁹² The legislation establishes prison terms of one to four years for pirating, sets fines ranging up to 3,000 times the value of software sold illegally, and permits the federal tax department to prosecute software pirates for tax evasion.⁹³ Additionally, the law eliminates a requirement that companies register software programs with the Ministry of Science and Technology.⁹⁴ “Software manufactured by foreign countries is protected . . . provided that Brazilian software” receives the same protection in the countries where the imported software originates.⁹⁵

On September 29, 1998, a Rio de Janeiro court delivered the first judicial decision under the software law.⁹⁶ The court found a Brazilian advertising agency, Artplan Comunicacao, guilty of using pirated software, including applications by Adobe, Autodesk, Microsoft, and Symantec.⁹⁷ The court ordered Artplan to pay damages of \$65 million, equivalent to 500 times the value of the illegal software discovered during a police inspection.⁹⁸

⁹⁰ USTR, “Special 301” on Intellectual Property Rights and 1996 Title VII Decisions (last modified May 2, 1996) <<http://www.ustr.gov/reports/301report/factsheets.html>> (USTR Fact Sheet).

⁹¹ See 1998 USTR REPORT TO CONGRESS, *supra* note 52, at 21.

⁹² See *Brazilian President Cardoso Signs Measures Penalizing Copyright Piracy*, 15 INT’L TRADE REP. (BNA) No. 8, at 338 (Feb. 25, 1998); see also *Brazilian Senate Passes Bill to Protect Software Copyrights*, 15 INT’L TRADE REP. (BNA) No. 4, at 154 (Jan. 28, 1998) (discussing the terms of the bill which extends new software protections, including the provision that protects copyrighted software for 50 years).

⁹³ See *Brazilian President Cardoso Signs Measures Penalizing Copyright Piracy*, *supra* note 92.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *Artplan Ordered to Pay US\$65m Damages*, BUS. TIMES (Malay.), Sept. 29, 1998, at 16.

⁹⁷ See *id.*

⁹⁸ See *id.*

After extensive trade pressure from the United States, Brazil finally granted meaningful copyright protection to computer software.

2.4. *International Treaties*

"Worldwide copyright does not exist."⁹⁹ Instead, protection against infringement depends on the national laws of each particular country.¹⁰⁰ International treaties between countries establish a minimum level of intellectual property protection that each signatory agrees to implement.¹⁰¹ Prior to TRIPs, multilateral treaties were the favored mechanism for internationally negotiating intellectual property requirements in developed and developing nations.¹⁰²

2.4.1. *Universal Copyright Convention ("UCC")*

In 1952, the UCC was signed, and was to be administered by the United Nations Educational, Scientific, and Cultural Organisation ("UNESCO").¹⁰³ The basis of the UCC is "national treatment," which requires that all member countries accord foreign works the same protection granted to domestic works.¹⁰⁴ Domestic formalities such as registration are excused if all published copies of a work bear a notice, or if the work is unpublished.¹⁰⁵ A member of the UCC can also impose additional requirements for works first published within its own territory.¹⁰⁶ The United States joined the UCC in 1955, but withdrew from UNSECO in 1984.¹⁰⁷ Although it was still a UCC member, the United States could not influence the UCC very effectively as a nonparticipant

⁹⁹ MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 372 (2d ed. 1995).

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See discussion *infra* Sections 2.4, 2.5.

¹⁰³ See Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732, 216 U.N.T.S. 133; BLAKENEY, *supra* note 19, at 26.

¹⁰⁴ See LEAFFER, *supra* note 99, at 373.

¹⁰⁵ See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 10 (1993).

¹⁰⁶ See *id.*

¹⁰⁷ See LEAFFER, *supra* note 99, at 373 & n.7 (citing *U.S. Notifies UNESCO of Intent to Withdraw*, 84 U.S. Dept. of State Bull. No. 2083, 41 (1984)).

in UNSECO.¹⁰⁸ This was a driving factor in the United States' entry into the Berne Convention in 1989.¹⁰⁹ The UCC is still marginally relevant to international intellectual property because, as of January 1, 1989, twenty developing countries were still members of the UCC but not the Berne Convention.¹¹⁰

2.4.2. *The Berne Convention*

The oldest multilateral copyright convention is the International Union for the Protection of Literary and Artistic Works (the Berne Convention), administered by the World Intellectual Property Organization ("WIPO").¹¹¹ Prior to TRIPs, the Berne Convention was the dominant international intellectual property agreement.¹¹² The Berne Convention was first established in 1886 and has been revised six times, most recently in 1971.¹¹³ In 1989, the United States became the last western country to join.¹¹⁴ The Berne Convention establishes detailed requirements regarding subject matter, basis of protection, preclusion of formalities (e.g., registration), minimum terms of protection, and exclusive rights of the copyright authors.¹¹⁵ Over eighty nations were Berne signatories when the United States joined.¹¹⁶

Entering the 1990s, the biggest weakness of WIPO was that it lacked dispute resolution mechanisms.¹¹⁷ This became a central motivation for developed countries to push for an intellectual property annex to the GATT, which would provide for a dispute resolution mechanism.¹¹⁸ In response to such criticism, WIPO established the WIPO Arbitration Center in 1994; as of the end of

¹⁰⁸ See *id.* at 378.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 373 n.6.

¹¹¹ See Berne Convention *supra* note 17; LEAFFER, *supra* note 99, at 375-76.

¹¹² See LEAFFER, *supra* note 99, at 394-95.

¹¹³ See *id.* at 375-76.

¹¹⁴ The delay was caused by the Berne Convention compliance requirement that the United States significantly change its copyright law regarding term, notice, and registration. See *id.* at 379.

¹¹⁵ See generally GATT OR WIPO?: NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY (Friedrich-Karl Beier & Gerhard Schricker, eds., 1988) [hereinafter GATT OR WIPO?] (providing a detailed discussion of the Berne Convention provisions).

¹¹⁶ See LEAFFER, *supra* note 99, at 378.

¹¹⁷ See BLAKENEY, *supra* note 19, at 25.

¹¹⁸ See LEAFFER, *supra* note 99, at 394-95.

1995, the Center had not been called upon to resolve a single intellectual property dispute.¹¹⁹ This reflects the reality that the WTO and the TRIPs Agreement have almost entirely eclipsed the influence of WIPO and the Berne Convention.

2.4.3. *The Buenos Aires Convention*

The United States and 17 Latin American nations are members of the Buenos Aires Convention, which took effect in 1911.¹²⁰ The central provision of the Convention is that "once copyright is obtained for a work in one member country, protection is given by all member countries without further formalities."¹²¹

Today, virtually all Latin American countries are members of the UCC, which provides largely the same protection with clearer terms.¹²² Therefore, even though Latin American publishers still affix a Buenos Aires notice ("All Rights Reserved") to their works, the Buenos Aires Convention no longer serves much practical purpose.¹²³

2.5. *The Regional Approach*

2.5.1. *The North American Free Trade Agreement*

The North American Free Trade Agreement ("NAFTA") was entered into on December 17, 1993, by Canada, Mexico and the United States.¹²⁴ NAFTA includes provisions to harmonize Canadian, Mexican, and U.S. intellectual property standards, including the protection of computer programs as literary works.¹²⁵ In addition, NAFTA emphasizes the effective enforcement of intellectual property rights.¹²⁶ It requires signatories to make pre-trial injunctive relief available in intellectual property cases, which

¹¹⁹ See BLAKENEY, *supra* note 19, at 25-26.

¹²⁰ See Buenos Aires Convention, Aug. 20, 1910, 38 Stat. 1785, 155 L.N.T.S. 179; LEAFFER, *supra* note 99, at 384.

¹²¹ LEAFFER, *supra* note 99, at 384-85.

¹²² See *id.* at 385.

¹²³ See *id.*

¹²⁴ See North American Free Trade Agreement, Dec. 17, 1993, 32 I.L.M. 289 (1993); Leaffer, *supra* note 99, at 399.

¹²⁵ See LEAFFER, *supra* note 99, at 399.

¹²⁶ See *id.*

“overturn[s] the reluctance of Mexican courts to grant such preliminary relief.”¹²⁷

NAFTA goes further than TRIPs in many of its provisions, which is understandable since only three parties are involved, as opposed to the more than one hundred parties that negotiated TRIPs.¹²⁸ NAFTA, as well as the USTR section 301 trade threats that have led to bilateral agreements, are good examples of the U.S. government effectively pushing for stronger intellectual property protection and enforcement in Latin America.¹²⁹

2.6. *The Multilateral Approach*

2.6.1. *TRIPs: GATT Addresses Intellectual Property*

In the 1980s, developed countries grew increasingly dissatisfied with international conventions such as the Berne Convention, which lacked adequate coverage of new technological advancements.¹³⁰ Even more importantly, the Berne Convention had no dispute resolution mechanism to deal with member states that neglected their treaty obligations.¹³¹

Industry groups and governments turned to the GATT as a means to confront intellectual property piracy.¹³² Between 1982 and 1986, a Preparatory Committee of the GATT identified the issues for the upcoming GATT Round.¹³³ The United States suggested that the Round consider the issue of intellectual property rights.¹³⁴

Developing countries, led by Brazil and India, questioned whether intellectual property was relevant to the GATT, given the existence of the Berne Convention and WIPO.¹³⁵ Those developing countries preferred WIPO as the leading international intellectual property body because WIPO is governed by an unweighted vote of its members (more than half of whom are devel-

¹²⁷ *Id.*

¹²⁸ *See id.* at 400.

¹²⁹ *See supra* Section 2.2.

¹³⁰ *See* LEAFFER, *supra* note 99, at 395.

¹³¹ *See id.*

¹³² *See id.* at 394.

¹³³ *See* BLAKENEY, *supra* note 19, at 2.

¹³⁴ *See id.* at 3.

¹³⁵ *See id.* at 4.

oping countries).¹³⁶ Therefore, the United States could not exercise strong influence in WIPO and could not use that venue effectively to seek stronger intellectual property protection in developing nations. Understandably, developing nations would look favorably upon the lack of U.S. influence in intellectual property affairs because it would give traditionally poor countries more autonomy and a greater voice in the international community.

During the GATT impasse, which developed after negotiations were frustrated by a deadlock over agricultural policies, the United States aggressively employed unilateral trade threats against developing countries in order to advance the U.S. intellectual property agenda.¹³⁷ In 1988, for example, the United States imposed trade sanctions on Brazil for its low protection of pharmaceutical patents.¹³⁸ That same year, the United States removed tariff exemptions for Indian pharmaceutical products for the same reason.¹³⁹ Not surprisingly, these actions led Brazil, India, and other developing nations to agree to negotiate a new international intellectual property agreement as part of the GATT.¹⁴⁰

After eight years of negotiations, the Uruguay Round of the GATT ended on December 15, 1993.¹⁴¹ The TRIPs Agreement was incorporated as an annex to the GATT.¹⁴² On January 1, 1995, the WTO replaced the GATT, overseeing the same trade agreement.¹⁴³

TRIPs covers all aspects of intellectual property by providing both national treatment and specific rules for minimum standards of protection for intellectual property rights.¹⁴⁴ TRIPs also provides for Most Favored Nation ("MFN") treatment.¹⁴⁵ MFN treatment "requires that any advantage, favor, privilege or immunity granted by a party to the nationals of any other country shall

¹³⁶ See SHERWOOD, *supra* note 32, at 5.

¹³⁷ See BLAKENEY, *supra* note 19, at 3-4, 6.

¹³⁸ See *id.* at 6.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See LEAFFER, *supra* note 99, at 395.

¹⁴² See *id.*

¹⁴³ See *id.* at 395-96.

¹⁴⁴ See *id.* at 396.

¹⁴⁵ See *id.*

be accorded . . . unconditionally to the nationals of all other [WTO] members.”¹⁴⁶

If a member does not comply with the TRIPs provisions, other members may invoke WTO dispute settlement procedures.¹⁴⁷ The WTO provides for meetings between the parties to resolve the dispute.¹⁴⁸ If the meetings fail, a disputing party may refer the matter to all the WTO members who, through a panel, make recommendations to the feuding parties.¹⁴⁹ If these procedures fail, the WTO may suspend trade obligations and benefits, such as reduced tariffs, which are normally afforded the offending party.¹⁵⁰

TRIPs additionally “provides for transitional implementation: . . . up to five years for developing countries, and extendable ten-year periods for the least developed countries.”¹⁵¹ Because Latin American countries were deemed “developing,” they had until 2000 to bring their domestic intellectual property laws into compliance with TRIPs.¹⁵² TRIPs explicitly requires copyright protection for computer programs,¹⁵³ so the Latin American signatories have agreed to implement copyright protection for computer software by 2000. Despite the TRIPs framework, the United States pushed for earlier compliance by way of unilateral trade threats.

As the January 1, 2000 deadline approached, developing countries including Argentina and Columbia requested a seven-year extension to implement TRIPs.¹⁵⁴ Developing countries argued that their under-financed administrations needed more time to implement the complex agreement.¹⁵⁵ The United States demanded that the WTO grant deadline extensions only on a case-by-case basis.¹⁵⁶ In addition, El Salvador, Honduras, and Nicaragua

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* For a detailed summary of the TRIPs provisions, see BLAKENEY, *supra* note 19.

¹⁵¹ LEAFFER, *supra* note 99, at 396.

¹⁵² *See* TRIPs Agreement, *supra* note 13, art. 65.

¹⁵³ *See id.* art. 10.

¹⁵⁴ *See* Daniel Pruzin, *Quad Group, Developing Countries Split over TRIPs Deadline Extensions*, 17 INT’L TRADE REP. (BNA) No. 4, at 143 (Jan. 27, 2000).

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

gua have requested an extension.¹⁵⁷ The deadline extension cannot be decided until member nations schedule new WTO talks.¹⁵⁸

After a special review, on December 17, 1999, the USTR announced that Columbia would remain on its "watch list" of countries targeted for possible Section 301 trade retaliation because of TRIPs noncompliance.¹⁵⁹ Argentina and Peru remain on the USTR Priority Watch List; Bolivia, Brazil, Chile, Costa Rica, Ecuador, Mexico, and Venezuela remain on the USTR Watch List.¹⁶⁰

Additionally, in December 1999, the WTO dispute settlement panel held that Section 301 is consistent with the WTO Dispute Settlement Understanding.¹⁶¹ The European Union brought the claim in 1998, arguing that Section 301 allows unilateral retaliation before a WTO Panel completes dispute arbitration; Brazil, Columbia, Costa Rica, and Ecuador appeared as third parties.¹⁶²

Before the ruling, President Clinton released a congressionally approved statement promising not to engage in Section 301 trade retaliation until the WTO finds a violation of U.S. trading rights.¹⁶³ In welcoming the WTO ruling, the USTR declared that Section 301 will continue to be a "cornerstone" of U.S. efforts to enforce its international trade policy.¹⁶⁴

¹⁵⁷ See Margalit Edelman, *The Latin Lag on Intellectual Property Protection*, J. COM., Nov. 2, 1999, at 7.

¹⁵⁸ See generally Gary G. Yerkey, *USTR Says New Talks Will Not Occur Until WTO Nations 'Rethink' Positions*, 17 INT'L TRADE REP. (BNA) No. 7, at 257 (Feb. 17, 2000) (describing the breakdown of Seattle WTO talks and the impasse in scheduling new talks).

¹⁵⁹ See Corbett B. Daly, *Colombia, Czech Republic Still on USTR List; Hong Kong and Malaysia Elude 301 Mention*, 17 INT'L TRADE REP. (BNA) No. 1, at 9 (Jan. 6, 2000).

¹⁶⁰ See USTR, *USTR Announces Results of Special 301 Annual Review*, *supra* note 70, at 9-30.

¹⁶¹ USTR, *WTO Panel Upholds Section 301* (last modified Dec. 22, 1999) <<http://www.ustr.gov/releases/1999/12/99-102.html>> (USTR Press Release).

¹⁶² See *id.*

¹⁶³ See Daniel Pruzin and Gary G. Yerkey, *WTO Panel Says Section 301 Provisions Compatible with Multilateral Trade Rules*, 17 INT'L TRADE REP. (BNA) No. 1, at 6 (Jan. 6, 2000).

¹⁶⁴ See *id.*

3. WHY SOFTWARE PIRACY IS A PROBLEM IN LATIN AMERICA

Software piracy, the illegal use and copying of software, is an enormous problem throughout Latin America.¹⁶⁵ This Section discusses the motivations for piracy, the reasons that developing nations have been slow to grant intellectual property protection to software, and the problems of enforcing new intellectual property laws.

3.1. *Motivations for Software Piracy*

Developing countries have conditions that tempt software pirates. Historically, intellectual property piracy has been rampant in poor countries because the nationals lack the resources to legitimately purchase expensive technology, the governments lack the resources and/or desire to enforce intellectual property rights, and the low standard of living provides greater incentive for citizens to engage in highly profitable piracy. More specifically, the principal motivations for intellectual property pirates are “quick profits, low promotional investments and risks, the ease of production and low costs, . . . unsatisfied market demand, . . . the difficulty of detection and proof, and the non-deterrent effect of or complete absence of laws.”¹⁶⁶

Profits are high because goods such as computer software are in extremely high demand, in large part due to the promotional costs incurred by the rights holders.¹⁶⁷ In addition, computer software can be copied inexpensively, because the pirates do not incur development costs, nor do they pay royalties.¹⁶⁸ The pirate need only invest in the initial copy, from which indistinguishable copies can be produced.¹⁶⁹

Developing countries have an unsatisfied market demand for goods priced too high for most consumers to afford.¹⁷⁰ Software

¹⁶⁵ See generally *supra* Section 1 (citing software piracy figures for Latin America).

¹⁶⁶ BANKOLE SODIPO, PIRACY AND COUNTERFEITING: GATT TRIPS AND DEVELOPING COUNTRIES 142 (1997).

¹⁶⁷ See *id.* at 142 n.140 (citing Marianne Levin, *The Meaning of Counterfeiting*, 18 IIC 435 (1987) and Tony Swafield, *Counterfeiting: The Growth Industry*, 98 T.S. Rev 14 (1990)).

¹⁶⁸ See *id.* at 142-43.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 143.

is extremely costly to develop, yet inexpensive to reproduce.¹⁷¹ Therefore, legitimate packaged software is necessarily expensive so that the owner of the rights may recoup development costs. A pirated version normally sells for a tiny fraction of the cost of the authentic version, thereby satiating the ravenous market demand for popular software products.

Detection and proof of piracy are difficult, because rights owners have no immediate way of knowing when the software has been pirated.¹⁷² The software industry is forced to estimate piracy rates by comparing their sales rates to estimated demand for their product.¹⁷³ In addition, the rights owner has difficulty proving piracy in a lawsuit unless the pirate is caught red-handed, which is a burdensome task given the secrecy of a pirate's operation.¹⁷⁴

Furthermore, most Latin American countries have been reluctant to grant copyright protection to computer software until recently.¹⁷⁵ Even where laws exist, software pirates have been undeterred because of lack of sanctions or enforcement.¹⁷⁶

Software pirates will continue to illegally copy software because of the enormous demand for, and low supply of, affordable product. Latin American nations must protect software intellectual property with legislation and enforcement, if not to line the pockets of U.S. software companies, then for the local economic benefits that intellectual property protection brings.¹⁷⁷

¹⁷¹ See *id.* at 142-43.

¹⁷² See *id.* at 145.

¹⁷³ See, e.g., 1998 GLOBAL SOFTWARE PIRACY REPORT, *supra* note 6, at 9-12 (describing industry method of estimating software piracy rates).

¹⁷⁴ See SODIPO, *supra* note 166, at 146.

¹⁷⁵ See *supra* Section 2.3 (discussing domestic copyright laws); *infra* Section 3.2. (providing reasons for Latin American reluctance to increase copyright protection).

¹⁷⁶ See SODIPO, *supra* note 166, at 146; see also *infra* Section 3.4 (discussing the lack of adequate laws and enforcement problems).

¹⁷⁷ See *infra* Section 3.2 (discussing potential economic benefits and refuting the Latin American perception that intellectual property rights benefit only developed nations).

3.2. *The Cultural Perception That Piracy is Acceptable:
Four False Propositions Cited to Support National
Policies of Weak Protection of Intellectual Property*

Four faulty justifications exist to support national policies of weak intellectual property protection.¹⁷⁸ The arguments are that weak intellectual property protection: (1) saves the country money; (2) promotes local industry; (3) helps acquire technology; and (4) lessens dependency on foreign nations.¹⁷⁹ These mistaken assumptions have historically resulted in resistance by Latin American government and private industry to granting intellectual property protection to computer software, which is manufactured primarily in the United States.

3.2.1. *The Cost Reduction Argument*

Governments of developing countries have argued that they benefit from weak intellectual property protection because it results in lower product prices.¹⁸⁰ Developing countries argue that leaving computer software unprotected prevents foreign manufacturers from charging high prices on their software "monopoly," and allows local industry increased access to the software produced in developed nations.¹⁸¹ However, this theory assumes that technological products that would be present in developing nations under conditions of intellectual property protection would also be present under non-protection conditions.¹⁸²

In fact, without protection, local industry has little incentive to develop new intellectual property. There is less technological competition within the country and, therefore, higher overall prices.¹⁸³ In addition, foreign technology producers may not be willing to place their products in a market that lacks intellectual property protection.¹⁸⁴ These factors weaken the assumption that local industries will have cheap access to technology should their country not grant intellectual property protection.¹⁸⁵ Finally, the

¹⁷⁸ See SHERWOOD, *supra* note 32, at 159.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* at 160.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.* at 160-61.

¹⁸⁴ See *id.* at 161.

¹⁸⁵ See *id.*

country may suffer if technology manufacturers decide to produce their product in another country that offers intellectual property protection.¹⁸⁶ The non-protecting country would thus be deprived of potential investment and revenue.

It would be unwise for developing nations to deny intellectual property protection on the faulty assumption that to do so would result in lower software prices. It is likely that more foreign and domestic software companies would be willing to do business in a nation that offered intellectual property protection. This would increase overall business investment in the region, improve product competition, and ultimately lower software prices.

3.2.2. *The Industry Promotion Argument*

Some have argued that weak intellectual property protection promotes local industry in developing countries.¹⁸⁷ This argument suggests that local industry would flourish if it possessed the freedom to copy foreign intellectual property, thus becoming a "free rider."¹⁸⁸ The assumption is that intellectual property is primarily owned by companies in developed countries.¹⁸⁹ Nascent industries in developing countries, the argument follows, would be able to reach higher competence by copying foreign technology for free.¹⁹⁰ Intellectual property protection would only be necessary after the developing countries reach a higher stage of technological sophistication—one in which domestic companies begin to develop original intellectual property worth protecting.¹⁹¹

However, this argument ignores the opportunity cost for domestic industry in developing countries. Without protection, the incentive to conduct innovative research and development is weak.¹⁹² A country is more likely to reach an international level of achievement if there is protection available for its domestic technological developments.¹⁹³ In countries with legal protection,

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* at 166.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.* at 169.

¹⁹³ See *id.* at 168.

new companies are more likely to dedicate resources to new innovations, rather than to rely on copying.¹⁹⁴ Therefore, the weak intellectual property protection option exercised by some developing countries retards, rather than promotes, local industry.¹⁹⁵

3.2.3. *The Technology Acquisition Argument*

The third argument often presented is that weak intellectual property protection reduces barriers to technology acquisition.¹⁹⁶ Again, this assumes that all worthwhile technology comes from outside the developing country.¹⁹⁷ In fact, valuable technology is being generated in countries such as Brazil and Mexico.¹⁹⁸ Some Latin American firms have developed mastery in their fields, despite having labored under a regime of weak intellectual property protection.¹⁹⁹ With greater intellectual property incentives, Latin American companies would significantly increase such promising innovation.²⁰⁰

The technology acquisition argument also assumes that desired technology will enter a country with weak protection, to be received and used by local companies and government agencies.²⁰¹ To the contrary, technology may not be available if the foreign producer decides not to market its product in a country with weak protection.²⁰²

Even if technology is acquired in developing countries, the level of knowledge that may be acquired from such technology is limited by the quantity of tacit knowledge already in the country.²⁰³ Certain technology, such as complex computer code, cannot be understood merely by looking at the end product. If the viewer lacks fundamental knowledge of the product's underlying principles, nothing will be gained from the acquisition of that technology. For example, there have been cases where poorly made, low strength copies of pharmaceuticals have caused severe

¹⁹⁴ See *id.* at 167-68.

¹⁹⁵ See *id.* at 170.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 171.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² See *id.* at 173.

²⁰³ See *id.* at 172.

medical problems among diabetics.²⁰⁴ Foreign technology is best acquired through legitimate relationships with the foreign manufacturers. Legitimate relationships, in turn, foster domestic technological education. Once a country acquires a knowledge base, the domestic research community can launch their own innovations.

For these reasons, the technology acquisition argument does not withstand scrutiny. Again, the cost of weak intellectual property protection is outweighed by the benefits of strong protection.

3.2.4. *The Lessened Dependency Argument*

Some argue that weak intellectual property protection reduces the dependency of developing countries on foreign technology sources.²⁰⁵ The argument is that intellectual property protection imposes foreign technology on developing countries, and that the absence of intellectual property protection frees countries from such dependency.²⁰⁶

This argument rests on the assumption that all technology comes from abroad.²⁰⁷ Again, the policy of nonprotection defeats its goal by discouraging domestic technological development.²⁰⁸ In reality, a policy of weak intellectual property protection results in the country *maintaining* dependency on foreign technology rather than fostering its own research community.²⁰⁹

3.3. *Public Sector Piracy*

Some of the worst software pirates in developing nations have been their own government bureaucrats. Governments that have freely engaged in piracy are less willing to implement or enforce intellectual property protection, thereby posing a greater challenge to U.S. intellectual property goals. Ms. Barshefsky has declared, "Governments must clean up their own houses if they are to successfully clean up copyright piracy in their private sec-

²⁰⁴ *See id.*

²⁰⁵ *See id.* at 173.

²⁰⁶ *See id.*

²⁰⁷ *See discussion supra* Sections 3.2.1 to 3.2.3.

²⁰⁸ *See* SHERWOOD, *supra* note 32, at 174.

²⁰⁹ *See id.*

tors.”²¹⁰ The United States has often found that one way to encourage Latin American governments to “clean up their own houses” is through the aggressive use of trade sanctions.²¹¹

On October 1, 1998, U.S. Vice President Al Gore announced a Presidential Executive Order, which required U.S. government agencies to establish procedures to prevent software piracy in federal offices.²¹² In addition, Mr. Gore asked Ms. Barshefsky to undertake a twelve-month initiative to work with other nations’ governments to prevent illegal government piracy of software.²¹³

In addition to U.S. government efforts, the U.S. software industry battles against public sector piracy in Latin America. U.S. software companies claim that, in Argentina, more than half of the nation’s software piracy is committed by Argentine government institutions.²¹⁴ Although the software industry²¹⁵ has reached agreements with six Argentine provinces, police raids on public agencies in other provinces have led to political standoffs because the agencies have failed to meet deadlines to legally register their software.²¹⁶

In 1997, Microsoft sued the Buenos Aires Province for breach of contract after the provincial government failed to reimburse Microsoft for software.²¹⁷ The parties reached an out-of-court settlement.²¹⁸

Government agencies that resist using legal software likely do not understand or believe the underlying macroeconomic benefits of intellectual property protection. Unilateral trade threats by the U.S. government and lawsuits by the U.S. private sector may

²¹⁰ USTR, *USTR Launches New Initiative to Fight Software Piracy* (last modified Oct. 1, 1998) <<http://www.ustr.gov/releases/1998/10/98-88.pdf>> (USTR Press Release) [hereinafter *USTR Launches New Initiative*].

²¹¹ See *supra* Section 2.2.

²¹² See *USTR Launches New Initiative*, *supra* note 210.

²¹³ See *id.* Of course, when the USTR “works” with other governments, the negotiations to improve laws and enforcement often involve trade sanction threats.

²¹⁴ See *Argentina: Government Blamed for Half of Losses from Software Piracy*, Pat. Trademark & Copyright L. Daily (BNA), Oct. 28, 1997, available in LEXIS, BNA Library, BNAPTD File [hereinafter *Government Blamed*].

²¹⁵ The software industry refers to software manufacturers Adobe, Autoexec, SCO, Symantec, and Microsoft, which are all represented by the Argentine organization, Software Legal. See *id.*

²¹⁶ See *Government Blamed*, *supra* note 214.

²¹⁷ See Rubenstein, *Argentina Amends Law*, *supra* note 49.

²¹⁸ See *id.*

force a change in the law, but probably will not produce a change in the minds of Latin American bureaucrats who embrace software piracy in their own offices.

3.4. *Lack of Adequate Laws or Enforcement of Existing Laws*

Until recently, most Latin American countries did not grant adequate intellectual property protection to computer software.²¹⁹ For example, Brazil did not treat software as a literary work protectable by copyright for seventy years, and instead gave software copyright protection only a short twenty-five-year term.²²⁰ In contrast, developed nations such as the United States deem software a literary work protected for life of the author plus seventy years; if the software is a work made for hire, it is protected for ninety-five years from first publication, or 120 years from creation, whichever is shorter.²²¹ Furthermore, Latin American countries, including Brazil, did not have a penal law that allowed police to confiscate all contraband goods during a raid; instead, police were limited to goods mentioned in their warrant.²²²

The U.S. software industry has expressed frustration with the absence of Latin American courts and counsel competent to handle technology cases, the local bias in the courts against foreign corporate litigants, and judicial corruption.²²³ The judiciary in these countries often needs training in new matters of high-tech intellectual property.²²⁴ In addition, some Latin American judicial systems lack the same adequate remedies or enforcement procedures that the U.S. judicial system employs.²²⁵ For example,

²¹⁹ See *supra* Section 2.3 for a more detailed discussion of domestic laws in Latin America regarding intellectual property protection for computer software.

²²⁰ See *U.S. Groups Call on Latin America to Bolster Patent, Copyright Protection*, Pat. Trademark & Copyright L. Daily (BNA), Jan. 26, 1993, available in LEXIS, BNA Library, BNAPTD File.

²²¹ 17 U.S.C. § 302 (1999).

²²² See *U.S. Groups Call on Latin America to Bolster Patent, Copyright Protection*, *supra* note 220.

²²³ See Casey P. August & Michael J. Buchenhorner, *Strategies for Developing Intellectual Property Portfolios in the Global Environment: Protection of Intellectual Property in Hostile Environments*, 21 CAN.-U.S. L.J. 261, 272 (1995) (advising intellectual property owners on how to protect their intellectual property rights in developing nations) (The authors work for IBM's Intellectual Property Division for Latin America and Canada).

²²⁴ See Studebaker, *supra* note 5, at 31.

²²⁵ See August & Buchenhorner, *supra* note 223, at 272.

Latin American judicial systems may have: "(1) no preliminary or final injunctive relief; (2) lack of seizure and impoundment remedies; (3) lack of exclusion of imports; (4) lack of compulsory process and/or discovery; (5) inadequate civil remedies; (6) inadequate criminal penalties; and (7) unreasonably slow enforcement process."²²⁶ These judicial weaknesses have been an obstacle for U.S. software companies seeking to protect their intellectual property in Latin America.

Despite such enforcement difficulties, the U.S. software industry has aggressively entered the Latin American software market due to the enormous profit potential.²²⁷ In 1995, participants in the software industry expressed optimism that the lack of protection for computer software would be short-lived because of the linkage between globalization of trade and intellectual property protection.²²⁸ While intellectual property experts have acknowledged the trade remedy available for U.S. companies under section 301 of the Tariff and Trade Act of 1930, they have also emphasized that "[r]ecent trends in IP aspects of international trade agreements are encouraging, and patience with present legal regimes and practices should eventually pay off."²²⁹ This perspective recognizes that, in time, Latin American nations will comply with TRIPs by passing laws that protect software intellectual property and by adequately enforcing such laws.

However, not all U.S. software companies possess the patience to wait for Latin American legislatures to grant intellectual property protection to software. The International Intellectual Property Alliance ("IIPA"), which represents owners of software intellectual property, has testified in front of the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks that "without an infrastructure of strong copyright laws and enforcement, 'we are quite simply helpless to stem the tide of piracy that

²²⁶ *Id.*

²²⁷ See PRICEWATERHOUSECOOPERS, *supra* note 2, at 25 (describing the U.S. packaged software industry's employment rates and revenue in Latin America).

²²⁸ See August & Buchenhorner, *supra* note 223, at 273 (stating that the lack of software intellectual property protection may be short-lived due to the TRIPs requirement, as well as to the expected compliance of developing countries).

²²⁹ *Id.* at 274.

threatens to close us out of market after market.”²³⁰ Despite such alleged helplessness, the U.S. software industry has continued to increase sales in the Latin American markets.²³¹

The U.S. industry has received the sympathy of the U.S. Congress. Senator Dennis DeConcini, the chair of the panel, declared that intellectual property piracy “adversely affects [the U.S.] balance of trade, [the U.S.] GNP, and [the U.S.] standard of living.”²³² He added that “a significant portion of the U.S. trade deficit would be erased’ if the ‘rampant piracy’” of U.S. intellectual property in foreign markets could be stemmed.²³³ With the encouragement of the IIPA, the U.S. Congress continues generous funding to the USTR and also funds training of foreign government officials in enforcement.²³⁴ The IIPA has praised the Senate for enacting the Special 301 provision of the Trade Act, a “critical piece of armament necessary to win the battle,” reflecting the belief of the U.S. private and public sectors that combative trade threats are essential to changing the intellectual property situation in developing countries.²³⁵ As a U.S. pharmaceutical company president declared, “To put it bluntly, [Latin American] countries want to steal U.S. technology, then undercut us in our own foreign markets.”²³⁶ U.S. intellectual property owners, with full support of the U.S. government, are engaged in a hostile struggle to force Latin American nations to implement and enforce intellectual property protection.

²³⁰ *Industry Calls for Stiffer Enforcement of Anti-Counterfeiting Laws Abroad*, Pat. Trademark & Copyright L. Daily (BNA), Sept. 30, 1992, available in LEXIS, BNA Library, BNAPTD File.

²³¹ See PRICEWATERHOUSECOOPERS, *supra* note 2, at 25 (stating that the expected year-on-year sales growth in the packaged software industry could generate tax revenues of \$3.9 billion to Latin American governments by the year 2000).

²³² *Industry Calls for Stiffer Enforcement of Anti-Counterfeiting Laws Abroad*, *supra* note 230.

²³³ *Id.*

²³⁴ *See id.*

²³⁵ *Id.*

²³⁶ Brower A. Merriam, Intellectual Property Rights: The Relationship to Latin American Trade and Investment, Address at the Miami Congressional Workshop (December 5, 1987), in DIALOGUE NO. 98 (Richard Tardanico, ed., The Latin American and Caribbean Center, Florida International University 1988).

In March 1999, Microsoft pledged a two-pronged strategy to combat software piracy in Latin America.²³⁷ In addition to remaining active in trade associations that document software piracy, Microsoft wants to develop local software industries.²³⁸ Microsoft signed an agreement with the Argentine government to increase Argentina's software exporting capacity in exchange for Argentina's increased effort to protect intellectual property.²³⁹

Microsoft may have recognized that Latin American countries are more likely to enforce intellectual property laws if the countries have local software industries to protect. Furthermore, Latin American countries have resisted enforcing laws pushed into existence by hostile foreign governments and corporations. Cooperation, rather than coercion, can lead to better enforcement of Latin American intellectual property laws.

4. THE UNITED STATES SHOULD PURSUE ITS POLICIES VIA THE WTO RATHER THAN THROUGH SECTION 301 ACTIONS

4.1. *Trade Pressures Change Latin American Copyright Laws*

Latin American nations rely heavily on the United States as a trading partner. Based on 1991 figures, the United States is the leading trade partner to Argentina, Brazil, Chile, and Mexico.²⁴⁰ For example, in 1991, 69.7% of Mexico's trade and 20.2% of Brazil's trade was with the United States.²⁴¹ If the United States had carried out its threatened 1997 tariff increase against Argentina, Argentine exporters would have lost between \$30 million and \$40 million per year.²⁴² This would have further widened Argentina's \$2.4 billion trade deficit with the United States. Therefore, Latin American nations would suffer great economic losses if slapped with barriers against exporting into the United States.

²³⁷ See Kevin G. Hall, *Gates: Microsoft Tackles Piracy in Latin America*, J. COM., Mar. 25, 1999, at 3A.

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See SELL, *supra* note 12, at 186 (summarizing data from U.N. INT'L TRADE STAT. Y.B., at 24, 102, 162, 170, 420, 498, 580, 866, U.N. Sales No. E/F.93.XVII.2 1991).

²⁴¹ See *id.*

²⁴² See *Argentine Executives, Politicians Blast Sanctions Under Consideration by U.S.*, 14 Int. Trade Rep. (BNA) No. 3, at 88 (Jan. 15, 1997) [hereinafter *Argentine Executives*].

USTR section 301 trade sanctions have been effective in Brazil. For several years in the 1980s, Brazil refused to introduce copyright legislation protecting computer programs.²⁴³ Brazil agreed to grant copyright protection to software only after the United States threatened it with trade sanctions.²⁴⁴ The U.S. trade threat was removed, until the U.S. government learned that the Brazilian government had barred Microsoft from marketing its MS-DOS product in Brazil, under the Brazilian National Informatics Law designed to protect Brazilian businesses.²⁴⁵ Clearly, the U.S. trade policy was designed to open up new intellectual property markets and protect U.S. products.²⁴⁶

It is indisputable that the U.S. section 301 trade policy has been instrumental in effecting recent changes in intellectual property laws in Latin America. However, the question remains: does unilateral coercion truly persuade a Latin American government to enthusiastically enforce new intellectual property laws?

4.2. *Similarities Between Section 301 Trade Sanctions and the WTO Enforcement Mechanism*

Similar to the United States' section 301, TRIPs provides for trade-based sanctions if a member fails to protect computer software rights. The WTO provides for consultations between the parties to resolve an intellectual property dispute and, if necessary, a referral to a WTO arbitration panel.²⁴⁷ If these procedures fail to resolve the offense, the WTO may suspend trade obligations and benefits normally afforded the offending party, such as reduced tariffs.²⁴⁸

The similarities in enforcement procedures of section 301 and WTO/TRIPs are not surprising, given that both reflect U.S. trade based approaches to intellectual property. The United States sug-

²⁴³ See Thomas Dreier, *National Treatment, Reciprocity and Retorsion— The Case of Computer Programs and Integrated Circuits*, in GATT OR WIPO?, *supra* note 115, at 63, 68-69.

²⁴⁴ See *id.* at 69.

²⁴⁵ See *id.*

²⁴⁶ See *id.*

²⁴⁷ See WTO, *The WTO's 'Most Individual Contribution,'* (last modified Feb. 6, 1998) <<http://www.wto.org/wto/about/dispute1.htm>> (describing WTO dispute settlement procedures).

²⁴⁸ See *id.* For a detailed summary of the TRIPs provisions, see BLAKENEY, *supra* note 19.

gested introducing intellectual property issues into the GATT negotiations only after the United States had enjoyed unprecedented intellectual property policy influence by using section 301 threats.²⁴⁹ Developing nations such as Brazil protested linking intellectual property and trade, because they realized they would be at a serious disadvantage in trade disputes.²⁵⁰ The United States found the GATT/WTO venue much more attractive than WIPO precisely because developed nations, with their immense value to developing nations as trading partners, have extensive leverage in a system that permits trade sanctions.

The United States is required under TRIPs to submit intellectual property complaints to the Dispute Settlement Body of the WTO and abide by the WTO ruling.²⁵¹ However, the United States indicated that it will continue to engage in an aggressive section 301 policy because it can pressure developing nations to enact even greater intellectual property protection than required by TRIPs.²⁵²

When the United States opts for swift section 301 results over slower WTO dispute settlement procedures and lower TRIPs protection requirements, the United States is not laying the foundation for true cultural acceptance of intellectual property rights. Rather, U.S. trade aggression increases the Latin American perception that the true beneficiaries of intellectual property rights are U.S. capitalists.

4.3. *Benefits of WTO Dispute Settlement over Section 301*

4.3.1. *Maintaining Good Diplomatic Relations with WTO Members*

Once the WTO Dispute Settlement Understanding becomes fully effective this year, the extent to which unilateral action can be taken to remedy a trade practice may become a contentious is-

²⁴⁹ See Michael L. Doane, TRIPs and International Intellectual Property Protection in an Age of Advancing Technology, 9 AM. U. J. INT'L L. & POL'Y 465, 473 (1994).

²⁵⁰ See *id.* at 473-74.

²⁵¹ See SELL, *supra* note 12, at 222-23.

²⁵² See *id.*

sue for the United States.²⁵³ It is an open question whether the United States, as a WTO member, may legally engage in such unilateral trade aggression. However, there is no doubt that the international community will vigorously protest such U.S. actions.

Indeed, during the December 1999 WTO meeting in Seattle that launched a new round of talks, developing countries expressed resentment at the long list of inflexible U.S. demands.²⁵⁴ Ultimately, the Seattle meeting ended without agreement on a future negotiations agenda.

The United States can lessen such diplomatic tension by ceasing their section 301 trade aggression, and relying primarily on the WTO Dispute Mechanism agreed to by over 100 GATT signatory nations.

4.3.2. *Respecting the Autonomy of Latin American Nations to Determine Their Own Laws*

The United States should respect the autonomy of Latin American nations to determine their own intellectual property laws. A nation's laws and policies are more effective when reached after independent national debate and deliberation. If a developing nation reaches, independently, the valid conclusion that it would benefit in the long term from intellectual property protection, then that nation would be eager to enact and enforce intellectual property laws. Instead, the United States has prodded and infuriated Latin American policymakers with unilateral trade threats.

For example, in January 1997, Argentine Foreign Relations Minister Guido di Tella protested against a U.S. threat of possible trade sanctions regarding Argentine intellectual property laws, stating, "We have a patent law which . . . was decided upon by Argentinians [sic] and it is perfectly compatible with norms contained in the GATT. Nobody can attempt trade reprisals against us for this law because we would denounce any such attempt before the World Trade Organization."²⁵⁵ The president of the Chamber of Argentine Exporters stated that "[t]here is nothing

²⁵³ See *id.* at 223 (citing Dorothy Shrader, *Intellectual Property Provisions of the GATT 1994: The TRIPs Agreement*, Cong. Res. Serv. Rep., Rep. No. 94-302 A, Mar. 16, 1994, at 13).

²⁵⁴ See *Trade In Parenthesis*, ECONOMIST, Nov. 13, 1999.

²⁵⁵ *Argentine Executives*, *supra* note 242, at 88.

wrong with the [intellectual property] law, but the U.S. is looking for GATT-plus. As a general policy, the U.S. is targeting . . . [intellectual property rights] worldwide, and it is looking for someone to make an example of.”²⁵⁶ Thus, both the Argentine public and private sectors expressed resentment against U.S. interference in their legislative decisions.

One can assume that Latin American nations would prefer to negotiate trade disputes under the auspices of the WTO rather than suffer unilateral trade pressure from the United States. Developing nations are already disadvantaged in trade disputes because of their reliance on richer trade partners. In the WTO, however, they would have the option of arbitration by an international panel. In addition, the Latin American nations agreed autonomously to comply with TRIPs by the year 2000.²⁵⁷ However, before the ink dried on their signatures, the United States demanded something very different: stronger Latin American intellectual property protection before 2000.

4.4. *Trade Sanctions Have Changed Laws, not Minds*

Only after extreme trade pressures from the United States have Latin American countries granted intellectual property protection to computer software.²⁵⁸ Had they believed in the need for such laws, they would have reached that conclusion without external pressure. Instead, their membership in the WTO required Latin American countries to gradually implement software protection.

In 1996, a Costa Rican Supreme Court Judge stated, “We must devise educational programs to teach the public to respect intellectual property laws in the same way we have taught it to understand and respect our tax laws. . . . The more people understand the need for intellectual property protection, the more creativity will flourish unencumbered by piracy”²⁵⁹ Realizing the

²⁵⁶ *Id.*

²⁵⁷ A counterargument is that developing nations had to agree to TRIPs in order to receive the bundle of GATT trade benefits, but that they had little desire to improve their intellectual property protection. Indeed, the strong resistance of developing countries to add intellectual property issues to the GATT indicates they did not favor a non-WIPO system that could punish their non-compliance with intellectual property protection.

²⁵⁸ See *supra* Section 2.2.

²⁵⁹ *Meeting Looks at Intellectual Property Protection in Western Hemisphere*, Pat. Trademark & Copyright L. Daily (BNA), Aug. 19, 1996, available in

benefits of education, U.S. software companies have worked to increase awareness in both the public and private sectors about the benefits of intellectual property protection to a domestic economy.²⁶⁰

Latin American nations have historically resisted granting strong intellectual property protection because they view it as primarily beneficial to foreign countries. Latin American nations will best enforce intellectual property protection when they realize its potential for domestic economic improvement. It remains to be seen whether Latin American countries will enforce new intellectual property laws passed only after hostile U.S. trade threats. Laws that were initiated and passed by Latin American countries would have resulted in the most effective intellectual property protection, but the United States did not wait for Latin American nations to pass new laws in willful compliance with TRIPs. Waiting for these countries to come to their own realizations about the benefits of intellectual property protection may have resulted in better enforcement, and a better situation in the long run for U.S. companies as well.

The USTR's January 2000 request for a WTO hearing regarding Argentina's weak pharmaceutical protection laws indicates that the USTR would indeed use the WTO dispute mechanism to battle piracy of software copyrights.²⁶¹ As of January 2000, the USTR was conducting a special review of developing countries to evaluate their TRIPs compliance.²⁶² The USTR stated it would work "in conjunction" with multilateral organizations such as the WTO to assist developing nations in meeting their TRIPs obligations.²⁶³ However, the USTR continues to apply unilateral trade pressure, keeping Argentina and Peru on the USTR "priority watch list" which may lead to U.S. trade sanctions.²⁶⁴ Therefore, although the United States is using the WTO framework to

LEXIS, BNA Library, BNAPTD File [hereinafter *Meeting Looks at Intellectual Property*].

²⁶⁰ See Autodesk, *White Paper: Why Autodesk Cares About Software Piracy... And Why You Should, Too* (visited Jan. 22, 1999) <<http://www.autodesk.com/products/whtpaper/piracy/whycare.htm>>.

²⁶¹ See *USTR Announces Result of Special 301 Annual Review*, *supra* note 70, at 4.

²⁶² See *id.* at 3.

²⁶³ See *id.*

²⁶⁴ See *id.* at 2.

achieve intellectual property protection in Latin America, the United States has not abandoned its aggressive unilateral trade policy.

5. CONCLUSION

The United States should halt its carrot-and-stick trade approach to intellectual property foreign policy. Although Latin American nations have reluctantly changed their copyright laws to grant protection to computer software, they have not changed the underlying mindset that resists change. In the future, the United States should resolve its intellectual property disputes in the WTO forum, a mechanism in existence largely because of U.S. influence. In addition, the United States should have the patience to allow Latin American countries to implement a genuine, self-determined enforcement of their new intellectual property laws.

A mindset shift will inevitably occur, because although intellectual property protection certainly assists U.S. software companies in their quest for profits, it also improves the economies of developing nations.²⁶⁵ For this reason, Latin American nations have slowly come to realize the importance of granting intellectual property protection to computer software. In time, the deep-seeded assumptions that have deterred intellectual property protection and enforcement will dissolve as Latin American countries enjoy the economic advantages of newly granted protection.

However, there is a risk that the Latin American governments will resist enforcing the nascent software intellectual property laws that were born of overzealous U.S. demands. Latin American countries have been enraged by perceived U.S. capitalist bullies, and may ignore the real benefits that enforced intellectual property protection can bring their people. Therefore, the U.S. government must be sensitive to the delicacy of the situation. In the long term, developing countries will better protect software if they have time to realize the predicted economic benefits of intellectual property protection. With a less aggressive trade policy, the U.S. software industry may not increase their profits as dramatically in the short term; however, the industry would surely

²⁶⁵ See *supra* Section 3.2 (analyzing the faulty assumptions of countries that have historically not granted intellectual property protection to technology).

enjoy long-term success in a market culture that has learned to value intellectual property protection.

WIPO has suggested that investment and the predictability of security of sound legal protection are key to the growth of intellectual property development in Latin America.²⁶⁶ "[T]o change the global economic dialogue from one of struggle to one of cooperation . . . countries must focus . . . on cultivating a capacity to generate the financing that is critical to the development of new ideas"²⁶⁷ The United States could provide foreign aid earmarked for Latin American research and development. Although such an investment would result in potential competition for U.S. companies, it would also increase Latin American self-interest in enforcing effective intellectual property protection.

The shortcomings of the USTR's actions have been described in unflattering terms:

Her policy, like that of many of her predecessors, is based on a narrow, legalistic view of the world. It is about screwing concessions from other countries, rather than about the mutual benefits of free trade. It is about enforcing the letter of [trade] agreements, at the expense of the bigger picture.²⁶⁸

Here, the "bigger picture" is how to foster an environment of effective intellectual property protection in Latin American markets for the mutual trade benefit of the United States and the Latin American nations. Such an accomplishment would enormously strengthen the Latin American nations economically, and would create a perpetually growing market for U.S. trade. The key is cooperation and education, rather than coercion.

²⁶⁶ See *Meeting Looks at Intellectual Property*, *supra* note 259.

²⁶⁷ *Id.*

²⁶⁸ *Objection*, *ECONOMIST*, Jan. 23, 1999, at 61.